Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-553

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITY OF RIVERTON, WYOMING, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE and NORTHERN ARAPAHOE TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming

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RESPONDENT'S BRIEF IN OPPOSITION

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November 21, 1988

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The Cross-Respondent, Red Creek Cattle Company, Barbara Webber, and Landis Webber, respectfully request that this Court deny the Cross-Petition for certiorari seeking review of the Wyoming Supreme Court's opinion and judgment in this case. That opinion is reported at 753 P.2d 76 (Wyo. 1988).

STATEMENT OF THE CASE

The history of the general adjudication and the general facts established by the evidence in the numerous hearings have been adequately set forth in the statement

of the case contained in the Cross-Petition of the *City of Riverton, Wyoming, et al. v. United States of America, et al.* at 2-8; and the statement of the case set forth in the Cross-Petition of the *Shoshone Tribe and Northern Arapahoe Tribe of the Wind River Indian Reservation v. The State of Wyoming, et al.*, No. 88-492; and the Petition of the *State of Wyoming v. United States of America, et al.*, No. 88-309.

The facts are supplemented only to the extent to which they apply to the narrow issue directed to these Cross-Respondents (hereafter Respondents). Respondents, together with Bertha Jones and Grace Graboski, are successors in interest to Indian allottees. As such, the Wyoming Supreme Court granted to them a water right with a priority date of 1868 for those lands which can be shown to have been irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter. The evidence indicates that the lands for which Landis Webber and Barbara Webber, and Red Creek Cattle Company claimed a 1868 priority had been continuously irrigated since the time their Indian predecessors had been granted allotments and within a reasonable time thereafter. Testimony of Landis Webber and Exhibits introduced at pages 406-440 of the Trial Transcript of the Lander Hearings. Bertha Jones and Grace Graboski only presented evidence of ownership of Indian allotments. Their permits and certificates of appropriation were previously in evidence through the State of Wyoming records. The pleadings requested the 1868 priority date for lands historically irrigated by their Indian allottees or place under irrigation within a reasonable time thereafter. None of the successors to Indian allottees sought to increase their acreage pursuant to the 1868 right.

REASONS WHY PETITION SHOULD BE DENIED

1. No real conflict exists between the opinion of the Ninth Circuit Court of Appeals and the Wyoming Supreme Court.

The reasons set forth by Cross-Petitioners (hereafter Petitioners) in requesting this Court to grant the writ, only Question III (pages 22-24 of the Cross-Petition) is directed to these Respondents. Petitioners are not challenging the award of an 1868 water right. The sole question presented is whether the Respondents, as successors to Indian allottees, may rely upon the 1868 priority only if the Respondents maintained such rights with continuous and uninterrupted use.

The Wyoming Supreme Court relied on *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981), cert. denied, 475 U.S. 1010 (1986) and numerous other Federal Court decisions, as its basis for awarding a reservation date of priority of 1868 to the Respondents. While the Wyoming Supreme Court did not specifically state the use had to be continuous and uninterrupted, there was probably no need to do so.

For the Respondents, Landis Webber testified and introduced Exihibits establishing the historical use of the water right from the time the allotment was improved by the Indian precedessors. The lands were irrigated by the Indians and later by the Indians successors pursuant to the 1868 right until such time as the State of Wyoming interfered with this historical use around 1948. Thereafter, the lands were continuously irrigated pursuant to the State enforced permit. The issue of continuous and uninterrupted use was never challenged at trial by the Petitioners or any other party.

Although evidence of continuous and uninterrupted use of water on the lands of Bertha Jones and Grace Gra-

boski was not introduced at trial, the documents evidencing their State permits and certificates of appropriation demonstrate that the use had been continuous and uninterrupted. By definition, the award of a certificate of appropriation on all of the historically irrigated allotments indicated continuous beneficial use.

Consequently, the matter of applying a rule of law which Petitioners believe to be omitted from the Wyoming opinion, thus being characterized as a conflict in the Ninth Circuit and the Wyoming decisions, is meaningless under the facts of this case. Evidence has been already presented, or will be presented upon remand, of the continuous use of water on the allotment lands. No claim has been made to expand the water rights from those historically adjudicated.

2. The issue presented by Petitioners is of minor importance in the overall case.

The Petition of the State of Wyoming (*State of Wyoming v. The United States of America, et al.*, No. 88-309); the Cross-Petition of the Tribes (*Shoshone Tribes and Northern Arapahoe Tribe of the Wind River Indian Reservation v. State of Wyoming, et al.*, No. 88-492); and the Cross-Petition in this case all raise numerous important and complex issues. However, while discussing the award to successors to Indian allottees, Wyoming did not attack the award as a Question Presented. The Tribes only addressed the award in relation to the nature of reacquired lands by the Indians. The balance of the issues raised by all of the Petitioners address complex legal issues affecting thousands of water users, both Indian and Non-Indian; involving the interplay between Federally awarded reserve rights and State adjudicated rights involving thousands of acre feet of water; and present and future water uses.

In comparison, the narrow issue presented by Petitioners concerning the reserved rights of these Respond-

ents pales in significance. Given the fact that Rspondents' water use has been continuous and uninterrupted, granting the writ for review of this legal issue would become almost meaningless. The United States Supreme Court should not become distracted from the larger and more important issues presented in the Petitions of the various parties.

3. The opinion of the Wyoming Supreme Court was accurate and correct.

The Wyoming Supreme Court reached the right result in awarding a reserved water right to successors to Indian allottees. The result was based upon substantial evidence introduced at at least two hearings concerning Respondents' claims. The Court was apparently persuaded by the well considered reasoning and rulings from the Ninth Circuit Court of Appeals and this Court concerning reserved water rights. The Wyoming Court remanded this award to a lower court to determine the acreage irrigated by the Indian predecessors and their successors. These lands will be the same lands for which certificates for appropriation were already awarded by the State Engineer, which award by definition was based upon continuous beneficial use.

4. The award of reserved water rights to the Respondents was fair.

The evidence demonstrated that Respondents enjoyed an 1868 priority use until the late 1940's, when the State of Wyoming forced the 1905 adjudication on the Respondents. Respondents on two separate occasions attempted to litigate the reserved right issue, but the matter was never appropriately reached by the Wyoming Supreme Court. *Merrill v. Bishop*, 237 P.2d 186 (1951) and 287 P.2d 620 (1955). While Respondents failed before the Special Master and the District Court in the case below, the Wyoming Supreme Court finally reached a decision which was fair and equitable in awarding a

reserved right to these Respondents, a right for which they had used or fought for since the turn of the century.

CONCLUSION

For these various reasons, the Petition for Writ of Certiorari as to the narrow issue of continuous use should be denied.

Respectfully submitted,

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